EXTRACTS FROM TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 613

THE AGRICULTURAL DITCH COMPANY, PLAINTIFF IN ERROR,

vs.

THE FARMERS' INDEPENDENT DITCH COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

RECORD FILED SEPTEMBER 29, 1896.

(16,392.)

(16,392.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 13, 1897.

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Petition.

STATE OF COLORADO, } ss:
County of Jefferson, }

In the District Court.

THE FARMERS' INDEPENDENT DITCH COMPANY, a Corporation, Plaintiff,
vs.
AGRICULTURAL DITCH COMPANY, a Corporation; JAMES P. MAXwell, as State Engineer; Isaac H. Batchellor, as Superintendent of Irrigation for Water Division No. 1; J. G. Hartsell, as Water Commissioner for District No. 7, Defendants.

Plaintiff for cause of action alleges:

1. That plaintiff, The Farmers' Independent Ditch Company, is a corporation duly organized, existing, and doing business under the laws of the State of Colorado in the county of Weld and State of Colorado.

2. That plaintiff for a long time last past has been and now is in the lawful possession, control, and management of that certain irrigating canal in Weld county known as the Farmers' Independent ditch, and by virtue of such possession, control, and management is required to carry and distribute and has carried and distributed water from the Platte river to its stockholders and others entitled to the use of the same for irrigation and other beneficial purposes.

3. That this suit is brought by plaintiff for itself and on behalf and for the use of its stockholders in and the users and consumers of water from said ditch; that the rights of plaintiff and the rights of its said stockholders and the users and consumers of water for irrigation and other purposes as aforesaid accrued to them and each of them by reason of the construction of said canal and the taking of water by the means thereof from the Platte river and the distribution and beneficial use of the same upon the lands lying thereunder at and of the date of November 20th, 1865, whereby an appropriation of the use of the water from the Platte river was made and perfected according to the then existing laws of the land by and for the use of the consumers and users of water from said ditch; that the amount so taken, used, and appropriated as aforesaid as of the 20th day of November, 1865, is sixty-one and sixty one-hundredths cubic feet of water, standard measurement, per second of time; that the use of said amount has continued without interruption or denial from the said 20th day of November, 1865, up to the present irrigating season of 1890 and until interfered with by the defendants, as hereinafter set forth; that said amount of sixty-one and sixty one-hundredths cubic — is necessary to supply the said users and consumers of water in the irrigation of their crops and in carrying on their agricultural operations upon the lands lying under

and irrigated from said ditch at all times during the irrigating seasons of the year.

4. That heretofore, to wit, on the 28th day of April, A. D. 1883, a decree was entered in the district court of the county of Arapahoe and in and for water district No. 2 which provided, *inter alia*, that the said users and consumers of water for irrigation and other purposes from the said the Farmers' Independent ditch were entitled to the priority of the use of the water not theretofore appropriated flowing and to flow into the Platte river during the irrigating season each year and to an amount not to exceed sixty-one and sixty one-hundredths cubic feet per second as of the date of November 20th, 1865, the said priority being numbered ten (10) by said decree and numbered one hundred forty-nine (149) by the tabulated statement kept in the office of the State engineer, that part of said decree being in words and figures as follows, to wit: "And it is hereby adjudged and decreed that there be allowed to flow into said ditch from said river, for the use aforesaid and for the benefit of the parties lawfully entitled thereto under and by virtue of said appropriation by construction and by priority No. 10, so much water as will flow in said ditch, it being eight feet wide on the bottom; depth of water to flow, two feet; slope of bank, one to one; grade, six and two-thirds feet per mile, computed at 3,696 cubic feet per minute."

5. That afterwards, to wit, about the 21st day of December, 1874, the defendant The Agricultural Ditch Company and its predecessors in interest built and constructed that certain ditch in Jefferson county known as the Agricultural ditch, and thereby claim to have appropriated one hundred and one and fifty-four hundredths cubic feet; that the said the Agricultural ditch is taken from Clear creek, in Jefferson county; that said stream known as Clear creek is one of the main tributaries of the said Platte river aforesaid and empties into the Platte river, in the county of Arapahoe and State of Colorado, and at a point in said river above the head gate of the said the Farmers' Independent ditch; that the said alleged appropriation of the Agricultural ditch and its claim of right to the use of water, if any it has, is wholly subsequent and junior to the appropriation of the plaintiff company and the users and consumers of water from its said ditch; that the waters flowing in said Clear creek as well as in the other tributaries of the Platte river are necessary to supply the said appropriation of defendant and others senior to it, and the use of the same belongs of right to said plaintiff to the extent of its said appropriation, subject only to the rights of senior appropriations.

6. That defendant The Agricultural Ditch Company has interfered with and taken the water flowing in Clear creek, appropriated as aforesaid by plaintiff, and has wrongfully turned and caused to be turned the same into its said ditch, and so deprived plaintiff and the users and consumers of water from its said ditch of the waters so flowing through the said Clear creek into said river and of its appropriation and use of the same for irrigation and other beneficial uses; that during the large parts of the irrigating season of 1890

plaintiff has been illegally deprived of its said use of water and the benefits of its appropriation thereof by means of said wrongful acts and doings of said defendant company, whereby the crops and agricultural products of the farmers and others as aforesaid dependent on the water of the said the Farmers' Independent ditch has been in a large measure lost and destroyed, to its damage and the damage of users of water from its said ditch, for whom it sues in the sum of fifty thousand dollars.

7. That the said James P. Maxwell is State engineer; that said Isaac H. Batchellor is superintendent of irrigation for water district No. 1; that said J. G. Hartsell is water commissioner of water district No. 7; that they and each of them have allowed and permitted the said The Agricultural Ditch Company to take and divert the waters flowing through Clear creek into the Platte river and appropriated by this plaintiff into the said the ditch of the Agricultural Ditch Company, and have permitted the said The Agricultural Ditch Company, without any right or authority of law whatsoever, to interfere with the rights and appropriations of plaintiff as aforesaid, to their great damage as aforesaid.

8. That defendants are now taking and threaten to continue during the present irrigating season and further seasons to take and use the water so appropriated as aforesaid by plaintiff, and plaintiff has therefore no adequate remedy at law for the redress for such injury and damage; that the result of said taking and continued taking and use of water as aforesaid in denial of the right of plaintiff will result in irreparable and continuing damage and injury to plaintiff.

Wherefore plaintiff prays this honorable court for temporary injunction restraining and enjoining said defendants, each and every one of them, their attorneys, agents, servants, employees, and successors, from interfering or in any manner preventing the use of said prior appropriations of the plaintiff and the flow of water from Clear creek into the Platte river to supply said appropriation of plaintiff; that said James P. Maxwell, Isaac H. Batchellor, and J. G. Hartsell and each of them and their successors be required to shut down the head gates of the said The Agricultural Ditch Company and to turn out the water flowing therein, and at all times, when water is flowing in said river and Clear creek sufficient to supply said appropriation of plaintiff and prior appropriations, to turn the same into plaintiff's said ditch, as required by law, and, upon the final hearing hereof, that perpetual injunction be made so restraining and enjoining said defendants and each of them, their agents, attorneys, employees, and successors, and also for decree adjudging that said plaintiff is entitled to have said water flowing through its canal as against said defendant ditch company, and that said Clear creek is a tributary of the said Platte river, and that the waters of the said Clear creek are, for the purposes of appropriation and distribution, the waters of the Platte river, subject to appropriation and distribution according to the date and amount of the appropriation upon the whole stream, and for fifty thousand

dollars damages and their costs in this behalf expended, and for such other and further relief as to the court it may seem meet.

JAMES W. McCREERY AND
W. H. BRYANT,
Attorneys for Plaintiff.

STATE OF COLORADO, } ss:
County of Weld, }

A. C. Albee, being first duly sworn, doth depose and say that he is secretary of the plaintiff company above named; that he has read the above and foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge and belief.

A. C. ALBEE.

Subscribed and sworn to before me this 16th day of September, A. D. 1890.

JOHN S. WHEELER,
[SEAL.] *Notary Public.*

My commission expires June 27th, 1894.

Endorsed as follows: "Filed October 2, 1890. W. H. Whitehead, clerk."

* * * * * * *

Demurrer.

STATE OF COLORADO, } ss:
County of Jefferson, }

In the District Court within and for the County of Jefferson.

THE FARMERS' INDEPENDENT DITCH COMPANY, a Corporation, Plaintiff,
vs.
THE AGRICULTURAL DITCH COMPANY; JAMES P. MAXWELL, as State Engineer; Isaac H. Batchellor, as Superintendent of Irrigation for Water Division No. 1, and James G. Hartzell, as Water Commissioner for District No. 7.

Now, at this day, comes the defendant The Agricultural Ditch Company, by C. J. Hughes, Jr., its attorney, and demurs to the complaint of the plaintiff herein, and for grounds of demurrer shows to the court the following grounds, to wit:

First. That said complaint does not state facts sufficient to constitute a cause of action against said defendant.

Second. That said complaint does not state facts sufficient to entitle said plaintiff to the relief asked or any relief whatever against said defendant either alone or jointly with the other defendants in said action.

Third. There is a defect of parties plaintiff in said complaint in this, to wit, that the alleged stockholders and users of water through and from the ditch alleged to belong and to be in the possession of

the said plaintiff are not joined with or made parties plaintiff in said suit.

Fourth. Because said complaint is uncertain and insufficient in this, to wit, that it does not state the facts showing the appropriation and continuous use by the said plaintiff and its alleged stockholders and consumers of the water and the acts by means of which they acquired priorities attempted to be set up in said complaint.

Fifth. That said complaint does not state facts sufficient to constitute a cause of action against this defendant or against this defendant jointly with its codefendants herein in this, to wit, that it does not state facts sufficient to show that the said defendants or any of them were parties to or in any manner affected or concluded by the alleged decree of priorities referred to and relied upon in said complaint.

Sixth. Because said complaint is uncertain, ambiguous, and unintelligible in this, to wit, that it fails to set up the whole of the alleged decrees mentioned therein or a sufficient portion thereof to show any right or rights thereunder accruing to the said plaintiff or any binding force thereunder of the same against this defendant or any of the defendants herein.

Seventh. This court has not and cannot have jurisdiction to inquire into and determine the matters sought to be the subject of litigation in said complaint in this cause, for the reason that, as appears in and by said complaint, there is now pending and has been an adjudication concerning the same subject-matter.

Eighth. That there is a defect of parties defendant in said suit in this, to wit, that the parties using and consuming water in said district No. 7 are not joined with the other defendants herein.

Ninth. That there is a misjoinder of parties defendant herein in this, to wit, that this defendant is improperly joined and united with the other defendants herein, to wit, James P. Maxwell, as State engineer; Isaac H. Batchellor, as superintendent of irrigation for water district No. 1; J. G. Hartsell, as water commissioner for district No. 7.

Tenth. And that said complaint is otherwise uncertain, unintelligible, and ambiguous and insufficient to be answered unto by this defendant.

CHARLES J. HUGHES, JR.,
Attorney for the Defendant The Agricultural Ditch Company, a Corporation.

Endorsed as follows: "Filed Oct. 23, 1890. W. H. Whitehead, clerk."

Judgment of District Court.

Be it remembered that on the 30th day of December, in the year of our Lord 1890, the same being one of the regular juridical days of the November term, A. D. 1890, of the said district court in and for the county of Jefferson, in the State of Colorado, the following proceedings, *inter alia*, were had and entered of record in said court:

Present: Honorable Clayton F. Becker, judge, presiding; John A. Hoagland; sheriff of said county; W. H. Whitehead, clerk of said court.

THE FARMERS' INDEPENDENT DITCH COMPANY
vs.
THE AGRICULTURAL DITCH COMPANY, JAMES P. MAXWELL, ISAAC H. BATCHELLOR, and JAMES G. HARTZELL.

At this day comes the plaintiff in this cause, The Farmers' Independent Ditch Company, by James W. McCrary and W. H. Bryant, Esqrs., its attorneys, and comes also The Agricultural Ditch Company, one of the defendants therein, by Chas J. Hughes, Jr., Esq., its attorney, no one appearing for any of the other defendants therein, and now the court hears the arguments of counsel, as well for said plaintiff as for the said defendant, The Agricultural Ditch Company, upon the demurrer of the said defendant, The Agricultural Ditch Company, to the complaint of the plaintiff filed herein.

And the court, being fully advised in the premises, doth sustain said demurrer: whereupon the said plaintiff in open court announces that it elects to stand by its said complaint and declines to amend the same. It is therefore considered, ordered, and adjudged by the court that the defendant The Agricultural Ditch Company do have and recover of and from the plaintiff, The Farmers' Independent Ditch Company, the costs of said defendant incurred in this action, and that execution issue therefor; and now the said plaintiff prays the court to grant it an appeal from said judgment to the supreme court of the State of Colorado, which appeal is granted by the court upon condition that said plaintiff file herein an appeal bond conditioned according to law in the sum of three hundred dollars within twenty days from this day, with sureties to be approved by the clerk of this court.

* * * * * * *

(NOTE.—This cause was then taken from the district court to the court of appeals by virtue of a writ of error.)

Judgment of Court of Appeals.

In the Court of Appeals.

STATE OF COLORADO, *ss:*

Be it remembered that heretofore and on, to wit, the 27th day of March, A. D. 1893, the same being one of the juridical days of the January, A. D. 1893, term of said court, the following proceedings were had and entered of record in said court, to wit:

THE FARMERS' INDEPENDENT DITCH COMPANY (a Corporation), Plaintiff in Error, *vs.* THE AGRICULTURAL DITCH COMPANY (a Corporation); James P. Maxwell, State Engineer; Isaac H. Batchellor, as Superintendent of Irrigation for Water Division No. 1; J. G. Hartsell, as Water Commissioner for District No. 7, Defendants in Error.	No. 316. Error to District Court, Jefferson County.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Jefferson as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error in the proceedings and judgment aforesaid of said district court, it is therefore considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed and stand in full force and effect, and that this cause be remanded to said district court for such other and further proceedings according to law as shall be necessary to the final execution of the judgment of said district court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the court that said defendants in error do have and recover of and from said plaintiff in error their costs in this behalf expended, to be taxed, and that they have execution therefor, and let the opinion of the court filed herein be recorded.

* * * * * * *

(NOTE.—This cause was then taken by appeal to the supreme court of Colorado.)

Judgment of Supreme Court of Colorado.

And on, to wit, the 18th day of May, A. D. 1896, the same being one of the juridical days of the January, A. D. 1896, term of said supreme court—present, Charles D. Hayt, chief justice; Luther M. Goddard, John Campbell, justices; Byron L. Carr, attorney general; Felix A. Richardson, bailiff; James A. Miller, clerk—the following further proceedings were had and entered of record in said supreme court, to wit:

"THE FARMERS' INDEPENDENT DITCH Company, a Corporation, Plaintiff in Error, *vs.* THE AGRICULTURAL DITCH COMPANY, a Corporation; James P. Maxwell, as State Engineer; Isaac H. Batchellor, as Superintendent of Irrigation for Water Division No. 1, and J. G. Hartsell, as Water Commissioner of District No. 7, Defendants in Error.	No. 3259. Error to Court of Appeals.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said court of appeals, as also upon the matters assigned for error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said court of appeals, it is therefore considered and adjudged by the court that the judgment aforesaid of said court of appeals be, and the same is hereby, reversed, annulled, and altogether held for naught, and that this cause be remanded to said court of appeals with directions to that court to reverse the judgment of said district court and require the defendants to further plead to the complaint.

It is further considered and adjudged by the court that said plaintiff in error do have and recover of and from said defendants in error its costs in this behalf expended, to be taxed, and that it have execution therefor, and let the opinion of the court filed herein be recorded."

* * * * * * *

(NOTE.—And afterwards, on the 21st day of August, 1896, the Agricultural Ditch Company sued out a writ of error to bring the cause to the Supreme Court of the United States.)

166-719

APR 10 1897
JAMES H. McKENNEY,
CLERK.

166-719

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1896.

THE AGRICULTURAL DITCH COMPANY *et al.*,
Plaintiffs in Error,
vs.
THE FARMERS' INDEPENDENT DITCH COMPANY,
Defendant in Error.

No. 613.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR,

ON MOTION TO DISMISS THE WRIT OF ERROR.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Defendants in Error.

F. C. Reid & Co., Printers, 1409-11 Lawrence St., Denver.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1896.

THE AGRICULTURAL DITCH COMPANY *et al.*, *Plaintiffs in Error*, vs. THE FARMERS' INDEPENDENT DITCH COMPANY, *Defendant in Error.*	*No. 613.*

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR,

ON MOTION TO DISMISS THE WRIT OF ERROR.

I.

STATEMENT OF FACTS.

This case was commenced in the District Court of Jefferson County, Colorado, on the 23d day of October, 1890, by The Farmers' Independent Ditch Company filing its complaint against the defendants, The Agricultural Ditch Company and others, praying for an injunction and other relief.

Upon the same day, a demurrer to the complaint was filed, which demurrer was duly argued, and, on December 30, 1890, judgment was entered

upon the demurrer, sustaining the same and dismissing the complaint.

The plaintiff elected to stand by its demurrer, and sued out a writ of error to the Supreme Court of the State of Colorado.

At the session of the Legislature of the State of Colorado for the year 1891, the Court of Appeals was created, and this case was transferred to that Court. It was there heard, and a decision rendered sustaining the judgment of the Court below.

A writ of error was then sued out to the Supreme Court of the State of Colorado, and a motion was made to dismiss the writ, which was by that Court denied. The Court then heard the writ of error, and, on the.... day of ....., 1896, rendered a judgment reversing the decision of the Court of Appeals, and remanding the case to that Court, with instructions to reverse the judgment of the District Court for Jefferson County, and to permit the defendant to file an answer in said cause, and directing further proceedings not inconsistent with the opinion of the Supreme Court.

A motion for rehearing was filed by the defendants in error, which was denied, and thereupon a petition for a writ of error to this Court was allowed.

II.

ARGUMENT ON MOTION TO DISMISS.

It is insisted by counsel for defendants in error upon this record, that there is no final judgment to which a writ of error could be sued out, and the defendants in error, therefore, have filed a motion to dismiss the writ of error upon the ground that there was no final judgment.

It is scarcely necessary to cite this Court to authorities in support of this motion. It has been uniformly held that a judgment of reversal by a State Court, which remands the case to an inferior State Court, with directions to proceed and try the case, is not a final judgment which will permit an appeal to this Court. Two cases decided by this Court present almost identically the same state of affairs which exists in this case. In one case the suit was begun in the Supreme Court of the State of New York to recover damages against the Directors of a National Bank. A demurrer was filed to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the Supreme Court, and the complaint dismissed. This judgment was affirmed at the general term of the Supreme Court. An appeal was taken to the Court of Appeals, where the judgment of the general term was reversed, and the case remanded to the Supreme Court, with directions that the defendants be permitted to withdraw the demurrer and to answer the complaint. A writ of

error was sued out to this Court, from this judgment of the Court of Appeals, and this Court directed the writ of error to be dismissed, upon the ground that the judgment was not final within the act of Congress permitting writs of error to this Court.

Bostwick vs. Brinkerhoff, 106 U. S., 3.

The proceedings in that case were identical with those in the case at bar, and no distinction whatever can be made between the two.

In a later case, the same rule has been announced by this Court, where a judgment of the Supreme Court of Michigan sustained a judgment of the inferior Court overruling a demurrer.

Meagher vs. Minnesota Thresher Mfg. Co., 145 U. S., 608.

And the following decisions are also decisive of the same proposition.

Moore vs. Robbins, 18 Wal., 588.
Parcels vs. Johnson, 20 Wal., 653.
District of Columbia vs. McBlair, 124 U. S., 320.
Smith vs. Adams, 130 U. S., 167.
Rice vs. Sanger, 144 U. S., 197.
Great Western Telegraph Co. vs. Burnham, 162 U. S., 339.

All of these cases are conclusive of this motion, and, resting upon the authority of the same

and the cases cited therein, we submit the motion that the writ of error be dismissed.

Respectfully submitted.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1896.

THE AGRICULTURAL DITCH COMPANY *et al.*, *Plaintiffs in Error*, vs. THE FARMERS' INDEPENDENT DITCH COMPANY, *Defendant in Error.*	*No. 613.*

MOTION TO DISMISS THE WRIT OF ERROR.

Comes now the defendant in error in the above entitled cause, and respectfully petitions this honorable Court to dismiss the writ of error in the above entitled cause, for the reason that the judgment of the Supreme Court of the State of Colorado, to which said writ of error has been sued out, is not a final judgment of the highest tribunal of the State of Colorado in said cause, but is only a judgment reversing a judgment of the Court of Appeals of the State of Colorado in the same cause and ordering said Court of Appeals to remand the case to the District Court of Jefferson County, Colorado, with instructions to permit the defendants in the cause to file an answer,

and for said cause to proceed to trial, for which reason the judgment of the Supreme Court of the State of Colorado is not a final judgment of the Court of last resort in said State, and no writ of error will lie to this Court on such a judgment.

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE,
Attorneys for Defendants in Error.

Office Supreme Court, U. S.
FILED.
MAR 22 1897
JAMES H. McKENNEY,
CLERK.

BRIEF OF PLAINTIFFS IN ERROR IN RESISTANCE TO MOTION TO DISMISS.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 672.

THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF NEBRASKA, AND THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF IOWA, PLAINTIFFS IN ERROR.

vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(16,451.)

BRIEF OF PLAINTIFFS IN ERROR IN RESISTANCE TO MOTION TO DISMISS

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1896.

No. 672.

THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF NEBRASKA, AND THE OMAHA AND COUNCIL BLUFFS RAILWAY AND BRIDGE COMPANY OF IOWA, PLAINTIFFS IN ERROR.

vs.

SPENCER SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

(16,451.)

I

It is the earnest desire of plaintiffs in error to have this case submitted to this court upon its merits. We believe, in view of the present record in the case, that there is such a question involved as will permit this case to be carried on for submission fully and in its regular order.

The question of the interpretation of the federal statute, found on page 27 of the Transcript of Record herein, has been the first consideration in the minds of the originators of the Omaha & Council Bluffs Railway and Bridge company since its inception, and this question has also been involved in all the litigation growing out of the building of the bridge and line of railway. On October 20, 1886, a company was organized and articles of incorporation adopted in Iowa for the building of this line and bridge across the Missouri river between the cities of Council Bluffs, Iowa, and Omaha, Nebraska. (See Transcript, page 12.) The company then applied to congress for permission to build a bridge across the Missouri river between the two cities, and on March 3, 1887, the act of congress which has been the cause of all the trouble was passed. (See Transcript, page 27.) On account of the wording of the grant, "That the Omaha & Council Bluffs Railway and Bridge "company, *an incorporation organized under the "laws of the states of Nebraska and Iowa,"* it became necessary to organize in Nebraska in order to take the franchise from the government and have the benefits of it. (See testimony of George F. Wright, page 36.) So the articles of incorporation were filed in Nebraska on the 1st day of April, 1887, (Transcript, page 10.) The Nebraska company was composed of and officered by the same men as the Iowa company, and was nothing more than the Iowa company made a resident of Nebraska to comply with the language of the grant of congress.

Taking advantage of this necessity, the plaintiff in the state court, by playing upon technicalities, induced that court to construe this act as forming two separate companies and hold that the tax in question was never earned by the Iowa company, but, if by any one, by the Nebraska company. We have contended throughout that in fact there never was but one company, and that the Iowa company, with a residence in Nebraska. That under the very language of the grant there must of necessity be but one company, and that must be the parent company. "*An incorporation* organized under the laws of the states of Nebraska and Iowa" is the language of the act. The very first question discussed by the Supreme Court of Iowa in rendering its opinion is the construction of this very grant in question, this federal statute. "The Missouri river being navigable and subject to the jurisdiction of the United States, congress passed an act March 3, 1887, authorizing 'the Omaha & Council Bluffs Railway and Bridge company, an incorporation organized under the laws of the states of Nebraska and Iowa, to construct and maintain a bridge across the Missouri river.' * * * It will be observed that the authority conferred by congress was to 'the Omaha & Council Bluffs Railway and Bridge company, an incorporation organized under the laws of the states of Nebraska and Iowa,' and that at that time only the Iowa corporation was in existence. It seems probable that because of this phraseology in the act of congress, and the fact that the bridge was to be constructed over a river dividing two states, it was thought necessary to organize a corporation under the laws of Nebraska." (See Opinion, Transcript, page 44.)

So at the very outset of the case, it is apparent that the Supreme Court of Iowa was called upon to interpret and pass upon the meaning and language of the federal statute in question. It is the keystone of the whole case. Under it we claim we are bound to give the parent company a

home in Nebraska; that the language of the statute required it. But the company remained an Iowa company and has always been a creature of the state of Iowa, subject to its laws and entitled to receive any assistance or aid which could be lawfully granted under the state statutes. The language of the act of congress does not make two separate and distinct corporations, as the plaintiff below insisted, and as the Supreme Court of Iowa found, but one "incorporation," which "incorporation" we contend had capacity to receive the tax voted in aid of the bridge in question. The bridge was built in accordance with the provisions of the ordinance of the city of Council Bluffs, Iowa, and the "Proposition for Tax." The taxpayers received just exactly what they bargained for when they voted the tax. But after they had received the benefits, with that gratitude all too common in the world at large, they turn upon their beneficiary and, by a strained construction and interpretation of the acts rendered necessary by the language of this federal statute, attempt to take back what they clamored to give.

This court is called upon to decide whether, under the language of the federal statute in question, this incorporation is not an Iowa company and entitled to receive the tax voted to aid it in the construction of the bridge.

The Supreme Court of Iowa, in its opinion, further said, "The Iowa corporporation had authority from its state and the United States, under which it could build to low water mark on the Nebraska shore." (Transcript, page 46.) We contend that the Supreme Court of Iowa had no right to place so broad a construction on this federal statute. The act of congress distinctly grants authority to "an incorporation organized under the laws of the states of *Nebraska and Iowa.*" How, under that act, can it be said that an incorporation organized under the laws of Iowa alone had the right "to build to low water mark on the Nebraska shore," and that the Nebraska incorporation was unnecessary?

We believe that congress intended that its statute should be construed as it plainly reads, and not as the Supreme Court of Iowa has seen fit to construe it. We claim the right and privilege under this statute to exercise our right as a joint corporation of Iowa and Nebraska, a creature of either and both states, one and indivisible, and under this act of congress of the United States we claim immunity from the demand of the defendant in error to recover back the taxes voted, levied, collected and used to aid in the construction of the bridge in question across the Missouri river.

We, therefore, insist that there is a federal question involved in this case, namely, the construction of a statute of the United States. We desire to have this court construe that statute, and we believe that when the case is fully and finally submitted, we will secure a reversal of the action of the Supreme Court of the state of Iowa.

II.

It has been held by this court and is the law, that if the adjudication of a federal question is necessarily involved in the disposition of a case by a state court, it is not necessary that it should appear affirmatively in the record or in the opinion of the state court that such question was there raised and decided.

Kaukauna Co. vs. Green Bay Co., 142 U. S., 254 (269.)

Willson vs. Co., 2 Pet., 245.

Armstrong vs. County, 16 Pet., 281.

Co. vs Needles, 113 U. S., 574.

Co. vs. County, 116 U. S., 410.

III.

This appeal is not taken for the purpose of delay. Plaintiffs in error believe they have been deeply wronged by

the construction placed upon this statute by the Supreme Court of Iowa. Of what earthly use to them would be delay which would only result in piling up interest on an already enormous judgment? They are perfectly good and solvent. They have filed a supersedeas bond to cover the entire judgment. It is ludicrous to think that for the mere purpose of putting off the evil day they would involve themselves in the added expense of an appeal to this court and the payment of interest at the rate of six per cent. a year on the judgment. They stand ready today to pay every dollar they honestly owe, but more than that they will not do until every legitimate remedy is exhausted.

We believe that a careful examination of this case will result in its reversal. For the reasons above set out we think the motion to dismiss should be overruled.

Respectfully submitted,

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